

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of A. L. Clutier, Minor.

UNPUBLISHED

April 22, 2014

No. 317330

Bay Circuit Court

Family Division

LC No. 07-009897-NA

In the Matter of A. L. Clutier, Minor.

No. 317331

Bay Circuit Court

Family Division

LC No. 07-009897-NA

Before: MARKEY, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Respondents appeal as right the trial court's order terminating their parental rights to their child, 32-month-old AL, who came into petitioner's care just after birth. We affirm.

I. FACTS AND PROCEDURAL HISTORY

AL was born on October 20, 2010. At that time, AL's siblings were in petitioner's care—placed with foster care parents Sue and Shane Kelley—because of respondents' neglect (including poor hygiene and filthy living conditions) and the fact that father had a 1991 criminal sexual conduct II conviction. In a separate case from her siblings, petitioner immediately petitioned for AL's removal.¹ After respondents waived probable cause, the trial court concluded that AL should be removed and placed with the Kelleys.

From the time of the adjudication in December 2010, until March 7, 2012, respondents slowly made improvements with their case service plan and formed a strong bond with AL. On

¹ In February 2011, father voluntarily released his parental rights to EH and JH. On August 24, 2011, the trial court terminated mother's parental rights to AK and CK and father's parental rights to CK. As of December 2012, mother maintained parental rights and visitation of MG.

March 7, 2012, the trial court found that respondents benefited from the case service plan and returning AL would not cause a substantial risk of harm. The trial court ordered respondents to cooperate with the family reunification program (FRP) and continue with the case service plan.

On May 11, 2012, the trial court conducted an emergency removal hearing following petitioner's amended petition based on allegations made by AK, AL's brother, that before he was removed from respondents' care, father sexually abused him and mother watched. AL's sister, EH, also had made sexual abuse allegations against father. The trial court found that AL's health, welfare, and safety could be in danger if she remained with respondents. AL was placed back with her siblings and the Kelleys.

Although the trial court found otherwise excellent compliance with the case service plan, it authorized petitioner to file a petition to terminate respondents' parental rights based on both AK's and EH's allegations. Mother argued that, if the trial court was inclined to terminate, she would separate from father to be with AL. By September 2012, respondents were separated² and AL was spending four unsupervised nights with mother at a time. The trial court released AL to the care of her mother and ordered that father was not to have contact with mother or AL.

At the review hearing on December 13, 2012, several witnesses testified that mother and AL had been seen with father, contrary to the trial court's September 2012 order. The trial court and the prosecutor likewise reported, on the record, that they had personally observed respondents together with AL.

Mother's story was not consistent when confronted about the contact: 1) she denied that they had any contact, 2) she claimed that the contact was coincidental, and 3) she claimed she had been told that contact was approved. The trial court found that it was very clear respondents should not allow father to have contact with AL and mother violated the trial court's order on at least four or five occasions. Respondents' poor judgment in ignoring the order suggested they might use poor judgment that could endanger AL. The trial court directed petitioner to file for termination of respondents' parental rights. The trial court ordered petitioner to remove AL and place her back in foster care.

At the trial regarding termination of respondents' parental rights, the parties stipulated that respondents successfully completed the case service plan. The record was also clear that AL had an affectionate relationship with respondents.

Fourteen-year-old AK, but not EH, testified regarding the abuse allegations. He explained, father "would call me in [the boys' bedroom] and tell me to take my pants down and underwear or I'd get a spanking with the belt." Father would sit on the single bed and AK would stand in front of him. AK would pull his pants and underwear down to the floor. Then, father would touch AK's penis with both hands. If AK asked father to stop, father would say, "Be quiet or else you - - you will get the belt." Mother would stand in front of the door of the bedroom. She could see and hear what father was doing. AK testified the abuse happened

² By the time of the March 2013 hearing, mother had filed for divorce.

similarly each time and it happened “a lot.” When AK privately asked mother to persuade father to stop abusing him, mother replied, “it would all be fine.”

AK testified that he never reported father’s abuse at the time it was occurring because he was afraid of father. He later revealed it to his foster mother and to his therapist when she had asked why AK’s younger brother, CK, might have poked a “bad guy” action figure in the penis with a pirate sword during play therapy. AK testified that he suspected father abused CK and his other siblings. He was therefore concerned for AL when she moved in with respondents.

Respondents both testified at trial that they had contact with one another after the trial court prohibited it. Mother admitted that she knew she was required to stay away from father to protect AL, but she failed to do so. In addition, when confronted about her contacts with father, she initially lied.

Following trial, the trial court found that several statutory grounds for termination of parental rights had been demonstrated by clear and convincing evidence and that termination of respondents’ parental rights was in AL’s best interests.

II. ANALYSIS

Respondents argue the trial court clearly erred in terminating their parental rights. We disagree. This Court reviews for clear error the trial court’s determination regarding the statutory grounds for termination and the child’s best interests. MCR 3.977(K); *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). “When reviewing the trial court’s findings of fact, this Court accords deference to the special opportunity of the trial court to judge the credibility of the witnesses. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

Before terminating a parent’s rights, a court must find by clear and convincing evidence that one or more of the statutory grounds for termination listed in MCL 712A.19b(3)(a)-(n) exists. MCL 712A.19b(3); *Olive/Metts Minors*, 297 Mich App at 40.

A circuit court must order termination of a parent’s rights if the court finds by a preponderance of the evidence that termination is in the child’s best interests. MCL 712A.19b(5); *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013); see also MCR 3.972(C)(1). The circuit court may consider a variety of factors in making the best interest determination, including the parent-child bond, the child’s need for permanency and stability, and the relative advantages of a foster home over the parent’s home. *Olive/Metts*, 297 Mich App at 41-42.

A. STATUTORY GROUNDS – FATHER

The trial court terminated father’s parental rights pursuant to MCL 712A.19b(3)(b)(i), (g), (j), and (l).

Those sections provide as follows:

- (b)(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.
- (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
- (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.
- (l) The parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter or a similar law of another state.

The record supports the trial court's findings on all four grounds. First, the trial court found by clear and convincing evidence that AK was sexually abused by father. That defendant had previously been convicted of sexual abuse of another small child demonstrated a pattern and AL risked becoming a victim of that pattern if placed in father's home. MCL 712A.19b(3)(b)(i). Second, by visiting mother and AL contrary to a court order that his visitation posed a risk to AL, father failed to provide proper care for AL and father's disregard for her safety during a critical time when sexual abuse allegations were being investigated suggested that father could not provide proper care and custody to 32-month-old AL within a reasonable time. MCL 712.19b(3)(g). Third, the trial court found that father's pattern of sexual abuse of young children made it impossible for AL to return to his care because of the reasonable likelihood father would abuse her as well. MCL 712.19b(3)(j). Finally, there is no dispute in the record that father's rights to CK had been previously terminated involuntarily. MCL 712.19b(3)(l).

Father urges this Court to disrupt the trial court's credibility findings regarding AK's testimony. Father challenges AK's timeline regarding the abuse and some inconsistencies between the forensic interview and his trial testimony, but the forensic interviewer explained at trial that a young child could not "conceivably" recall abuse that occurred over several years in one sitting. She also explained that each act of sexual abuse is hard for a child to pinpoint because it becomes enmeshed in the child's life. AK consistently testified that the abuse occurred "a lot" and defendant abused him similarly every time.

Father's claim that AK displayed no emotion when testifying about the abuse is inconsistent with the record. Michelle Hugo, who shared a therapeutic relationship with AK and sat with him during his testimony, testified that AK was "very anxious" at trial. Although father claims that AK was untruthful because he did not make the allegations earlier and he wanted AL returned to his adoptive home with the Kelleys, the trial court—with its special opportunity to observe AK's testimony first-hand—interpreted the evidence differently. Instead, the trial court found that AK would have carried the "burden of sexual abuse on his shoulders silently and alone." But when AL was sent to live with AK's abuser, AK broke his silence to be a "protective big brother." Hugo opined that AK had not been coached and he was not lying. We

defer to the trial court's credibility assessment. *Fried*, 266 Mich App at 541; *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991).³

B. STATUTORY GROUNDS – MOTHER

The trial court terminated mother's parental rights pursuant to MCL 712A.19b(3)(b)(ii), (c)(ii), (g), (j), and (l). Those sections provide as follows:

- (b)(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.
- (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

* * *

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

- (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
- (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.
- (l) The parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter or a similar law of another state.

³ Even if we concluded the trial court clearly erred in finding AK credible, the record supports the trial court's finding that MCL 712A.19b(3)(l) constituted an additional ground for termination. Father's parental rights to CK were involuntarily terminated despite attempts at reunification.

The record supports the trial court's findings on all five grounds. AK testified that his mother watched while father sexually abused him. Moreover, when he asked her for help, mother did nothing. Although mother subsequently sought counseling for her lack of assertiveness with father, she was unable, or unwilling, to prevent father from visiting AL after the court had prohibited their contact. Mother's past failure to assert herself with father to protect her children demonstrated a reasonable likelihood that AL would suffer injury or abuse if placed in mother's home. MCL 712A.19b(3)(b)(ii). Although mother challenges AK's credibility on appeal, claiming he was motivated to lie, this Court again defers to the trial court's credibility determination. *Fried*, 266 Mich App at 541

AK's allegations arose during AL's proceeding. The trial court recommended that, to keep AL safe, father should have no contact with her. Not only did mother fail to comply with that recommendation, but she also lied about her noncompliance. Given the evidence that mother has a long history of failing to assert herself with father to protect her children, it was not clear error to conclude that there was a reasonable likelihood that AL would suffer injury or abuse if placed in mother's home. MCL 712A.19b(3)(c)(ii).

By allowing father to visit AL contrary to the court order, mother failed to provide proper care for AL. On appeal, mother claims she had made improvements, but even her counselor testified that mother's interactions with father suggested she had not yet achieved the goal of assertiveness. It was not clearly erroneous to conclude mother could not provide proper care and custody to AL within a reasonable time, MCL 712A.19b(3)(g), and that AL would be harmed if returned to mother's home, MCL 712A.19b(3)(j). Mother does not dispute on appeal that her rights to AK and CK (AL's brothers) had been previously terminated involuntarily. MCL 712.19b(3)(l).

C. BEST INTERESTS

More than a preponderance of the evidence supports the trial court's determination that termination of respondents' rights was in AL's best interests. The trial court acknowledged respondents' love for AL. AL was happy to see respondents and sought mother out for comfort. But the record demonstrated that exposure to father posed a risk to AL. Moreover, respondents ignored that risk. Therefore, the trial court properly considered the relative advantages of a permanent placement away from respondents. AL bonded with the Kelleys, with whom she had lived most of her life. AL also shared a bond with her siblings and would be able to live with most of them at the Kelleys' home. The trial court had already unsuccessfully removed AL from the Kelleys' foster care twice to live with respondents. It was not clear error to conclude that she deserved the permanency that adoption could provide.

Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray